A.F.R.

(51)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench : Hon'ble Shri Vijay Kumar Shrivastava, J.

Writ Petition No. 1411 of 2005

Janki Kujur

Versus

Philmon & Others

ORDER

Post for 10-01-2007

Sd/-
V.K.Shrivastava
Judge

(52)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Single Bench : Hon'ble Shri Vijay Kumar Shrivastava, J.

Writ Petition No. 1411 of 2005

PETITIONER : Janki Kujur widow of Late Nansai, Caste Uraon, aged about 42 years, resident of village Chiknipani, Tehsil Pathalgaon, District Jashpur (CG).

Versus

RESPONDENTS :

1. Philmon, son of Loyaram, aged about 49 years, Caste Uraon, resident of Village Chiknipani, Tehsil Pathalgaon, District Jashpur (CG).
2. Tubiyas, Minj, son of Lorango, Caste-Uraon.
3. Dayaram, son of Jhagruram, Caste Uraon.
4. Devnees, son of Matiyas, Caste Uraon.
5. Lalsai, son of Budhwa, Caste Uraon.
6. Manoharlal, son of Gomaha, Caste Uraon.
7. Loharsai, son of Baital, Caste Nagvanshi.

   No.2 to 7 are residents of Village Chiknipani, Tehsil Pathalgaon, District Jashpur (CG).
8. The Presiding Officer, Booth No.171.
9. The Presiding Officer, Booth No.172.
10. The Presiding Officer, Booth No.173.
11. State of Chhattisgarh, through the Secretary, Department of Panchayat, D.K.S. Bhawan, Raipur.

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12. The Sub Divisional Officer, Tehsil Pathalgaon, District Jashpur.

13. The Returning Officer, Gram Panchayat Election, Pathalgaon.

Present :-

Ku. Sharmila Singhai, counsel for the petitioner.

Shri Ravish Chandra Agrawal, Sr. Advocate with Shri Sanjay S. Agrawal, counsel for the respondent No.1.

Shri Parag Kotecha, counsel for respondents No.3, 4, 6, 8, 9 & 10.

Shri Sunil Sahu, counsel for respondents No.2, 5 & 7.

Ku. Deepali Pandey, Panel Lawyer for the State/respondents 11, 12 & 13.

ORDER
(Passed on 10th January, 2007)

Prescribed Authority (Panchayat), Pathalgaon, while trying the election petition bearing No.3/A-89/2004-05 vide impugned order dated 18-3-2005 directed for recounting of votes and after recounting vide impugned order dated 21-3-2005 declared respondent No.1/Philmon elected in place of petitioner/Janki Kujur. Feeling aggrieved this writ petition under Article 226/227 of the Constitution of India.

2) An election for the post of Sarpanch, Gram Panchayat Chiknipani, took place. The petitioner and respondents No.1 to 7 filed their nominations, the same were found in order, therefore, they were allotted symbols to contest the election. After polling counting of votes was conducted. The petitioner herein secured 254 votes whereas respondent No.1 herein secured 253 votes, therefore, by a margin of one vote petitioner was declared elected and the Returning Officer on 27-1-2005 issued a certificate in favour of the petitioner to that effect.

3) Being dissatisfied by the result of election respondent No.1 instituted an election petition under Section 122 of the M.P./C.G. Panchayat Raj Adhiniyam, 1993 (for brevity "Adhiniyam, 1993") before the

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Prescribed Authority, *inter alia*, pleading that six valid votes cast in favour of respondent No.1 were kept in the category of invalid votes and all the Presiding Officers in connivance with the petitioner in order to allow him undue advantage did it and thereby after counting declared the petitioner as winning candidate. Respondent No.1 asked for showing the rejected votes, but the Presiding Officers did not allow it and even his application made to the Returning Officer was illegally rejected. He claimed relief for recounting of votes and declaring himself to be a returned candidate.

4) Respondents No.2, 4, 5, 6 & 7 supported the contention of respondent No.1 whereas respondent No.3, denied all the allegations made by respondent No.1. He pleaded that in accordance with the rules, counting has been conducted. No objections have been raised by respondent No.1 or his agents or any other candidates and after completion of the counting the result was declared. Respondents No.8, 9 and 10 are the Presiding Officers, they also denied all the allegations, they further pleaded that no one raised any objections, after counting, counting slips have been given to contestants or their agents.

5) Petitioner contested the election petition and pleaded that allegations leveled by respondent No.1 are false. During counting contestants and their agents were present, but no one raised any objection nor any application was made. Even no such document has been filed by respondent No.1 along with his petition. In absence of his application in accordance with Niyam 80 of the M.P./C.G. Panchayat Nirvachan Niyam, 1995 (for brevity "Niyam, 1995") and other particulars his petition is liable to be dismissed *in limine*.

6) No document relating to the application filed by respondent No.1 before the Returning Officer for recounting has been annexed along with the petition, but subsequently one original document to this effect has

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been introduced by respondent No.1. Copy of that document was not provided to petitioner or other respondents. Petitioner filed an application for opportunity to adduce evidence, but his application was rejected vide order dated 18-3-2005 stating that to determine valid and invalid votes no evidence is necessary and after perusal of ballots it can be decided whether any mischief has been played or not. Further the Prescribed Authority on the ground that respondent No.1 lost his election only by margin of one vote, who made an application before the Returning Officer complaining mischief committed by the Presiding Officers and has also filed that application having note of Presiding Officer, ordered recounting of the votes. On 21-3-2005 recounting was conducted and respondent No.1 was declared elected in place of the petitioner.

7) Niyam 80 of Niyam, 1995 is reproduced below :

> "**80. Recount of Votes :** (1) After an announcement has been made by the Returning Officer or such other officer authorized by him, of the total number of votes polled by each candidate under sub-rule (2) of rule 77, a candidate or, in his absence, his election agent or his counting agent may apply in writing to the Returning Officer or such officer authorized by him, for a recount of all or any of the votes already counted, stating the grounds on which he demands such recount.
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> (2) On such an application being made the Returning officer or such other officer authorized by him shall decide the matter and may allow the application in whole or in part or may reject it in toto if it appears to him to be frivolous or unreasonable.
>
> (3) Every decision of the Returning Officer or such other officer authorized by him, under sub-rule (2) shall be in writing and contain the reasons therefor.
>
> (4) If the Returning Officer or such other officer authorized by him, decides under sub-rule (2) to allow an application either in whole or in part, he shall—
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> (a) count the ballot papers again in accordance with his decision;
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> (b) amend the result sheet to the extent necessary after such recount; and

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(c) announce the amendment so made by him.

(5) After the total number of votes polled by each candidate has been announced under sub-rule (2) of rule 77 or sub-rule (4) the Returning Officer or such other officer authorized by him shall complete and sign the result sheet and no application for a recount shall be entertained thereafter :

Provided that no step under this sub-rule shall be taken on the completion of the counting until the candidates and election agents present at the completion thereof have been given a reasonable opportunity to exercise the right conferred by sub – rule (1).

(6) The counted ballot papers shall be bundled and kept in the manner mentioned in sub-rule (3) of rule 77.

(7) Result sheets in Form 16, 17, 18 and 19 for Panch, Sarpanch, Member of Janpad Panchayat and Member of Zila Panchayat respectively, prepared by such other officers as are authorized by the Returning Officer, shall be submitted by them, in separate envelopes to the Returning Officer for compilation and tabulation of votes polled by each candidate.

(8) The Returning Officer on receipt of result sheets under sub-rule (7) shall enter of cause to be entered the total number of votes polled by each candidate contesting for a seat of Sarpanch, Member of Janpad Panchayat or Member of Zila Panchayat at each polling station of the concerned constituency in subsequent part or parts of Form 17, 18 and 19 respectively and complete and sign the result sheet."

8) The Hon'ble Apex Court rending judgment in the case of **Sohan Lal vs. Babu Gandhi and others**[1] held as below :

"After declaration of results, the Returning Officer has no power either to direct re-count or to change the results of the election. Once the result is declared, the only remedy for an aggrieved party is an election petition under Section 122. In such a case, the court or the tribunal is bound to consider the plea and where a case is made out, it may direct re-count depending upon the evidence led by the parties. It is not correct to hold that in an election petition, after the declaration of the result, the court or tribunal cannot direct re-counting of votes unless

[1] (2003) 1 SCC 108

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> the party has first applied in writing for re-counting of votes. There is no prohibition in the Act or under the Rules prohibiting the court or tribunal to direct a re-counting of the votes. Even otherwise, a party may not know that the re-counting is necessary till after the result is declared. At this stage, it would not be possible for him to apply for re-counting to the Returning Officer. "

9) From the legislation and law laid down by the Hon'ble Apex Court, it is clear that candidate contesting the election during counting of votes at an appropriate stage, but before declaration of results, has right to ask for recounting on valid grounds and thereafter he has right to claim recounting by filing election petition. Therefore, during pendency of the election petition recounting can be claimed on valid grounds, even otherwise, candidate may not have asked for recounting during counting in accordance with Niyam 80 of Niyam, 1995.

10) Here in the instant case, though an application addressed to the Returning Officer has been introduced by respondent No.1, but in that application he did not mention the date when it was made, even some one who put his note by red ink also did not mention the date of presentation of application or date below his initial. Here it is not out of place to mention that if this application was made to the Returning Officer it should have been in the file of election proceedings, how this application, if endorsed by any of the election officer, came to the custody of respondent No.1, has not been explained. It is evident from its bare reading that this application was made after declaration of the result and the Returning Officer or any officer authorized by him was not empowered to direct for recounting of votes after declaration of result.

11) Learned counsel for respondent No.1 vehemently contended that once the recounting has been ordered and counting has been completed, the Court cannot refuse to give effect to its result and to support his contention, placed his reliance in judgment rendered by the Hon'ble Apex

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Court in the matter of **T.A. Ahammed Kabeer vs. A.A. Azeez and others**[2]. On the other hand, learned counsel for the petitioner contended that if the order passed by the Prescribed Authority for recounting is in contravention of prescribed and settled norm on such a recount its result cannot be given effect to and placed her reliance in the judgment of the Hon'ble Apex Court in the matter of **Vadivelu vs. Sundaram and others**[3]. Law laid down by the Hon'ble Apex Court in both the above cases are reproduced below :

> "**T.A. Ahammed Kabeer (supra[2]) :** It is true that a re-count is not to be ordered merely for the asking or merely because the court is inclined to hold a re-count. In order to protect the secrecy of ballots the court would permit a re-count only upon a clear case in that regard having been made out. To permit or not to permit a re-count is a question involving jurisdiction of the court. Once a re-count has been allowed the court cannot shut its eyes to the result of re-count on the ground that the result of re-count as found is at variance with the pleadings. Once the court has permitted re-count within the *well-settled parameters of exercising jurisdiction in this regard*, it is the result of the re-count which has to be given effect to."

> "**Vadivelu (supra[3]) :** The Supreme Court has consistently taken the view that re-count of votes could be *ordered very rarely and on specific allegation in the pleadings in the election petition that illegality or irregularity was committed while counting*. The petitioner who seeks re-count should allege and prove that there was improper acceptance of invalid votes or improper rejection of valid votes. If only the court is satisfied about the truthfulness of the allegation, it can order re-count of votes. Secrecy of ballot has always been considered sacrosanct in a democratic process of election and it cannot be disturbed lightly by bare allegations of illegality or irregularity in counting. But if it is proved that purity of elections has been tarnished and it has materially affected the result of the election whereby the defeated candidate is seriously prejudiced, the court can resort to re-count of votes under such circumstances to do justice between the parties."

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[2] (2003) 5 SCC 650
[3] (2000) 8 SCC 355

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12) In M.P./C.G. Panchayats (Election Petitions, Corrupt Practices and Disqualification for Membership) Rules, 1995, Rule 5 prescribes contents of the petition, which reads as below :

> "**5. Contents of the petition.**—An election petition shall—
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> (a) contain a concise statement of all material facts on which the petitioner relies:
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> (b) set forth with sufficient particulars, the grounds on which the election is called in question:
>
> (c) be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (V of 1908), for the verifications of pleadings."

13) From the above legislation and law laid down by the Hon'ble Apex Court in the aforesaid cases, it is held that in election petitions when recount is claimed that cannot be allowed merely on the ambiguous allegations, but party claiming recount has a heavy duty to plead complete details and to prove his allegations. An order of recounting of votes can be passed on specific pleading and its proof and when a clear case for recounting is *prima facie* established well within settled parameter for recounting of votes.

14) Here in the instant case, it was alleged that the Presiding Officers in connivance with the petitioner have rejected six votes, which were cast in favour of respondent No.1 and thereby six valid votes have not been counted in his favour and the same was specifically denied by the petitioner and even by co-contestant i.e. respondent No.3 and Presiding Officers. No details regarding six ballots have been given by respondent No.1, therefore, so far as particulars are concerned, sufficient particulars are missing. So far as trial is concerned, for determining the correctness of allegation, the same was required to be tried in accordance with the Code of Civil Procedure, but without trying the dispute and without considering the nature of the pleading, when the petitioner by filing an application prayed to adduce evidence, the same was rejected and

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thereby refusing prayer for granting opportunity to petitioner, and without having any evidence in support of allegations the Prescribed Authority illegally, ignoring the well settled parameters has exercised his jurisdiction by directing recounting of votes, therefore, not only the impugned order dated 18-3-2005 directing recounting of votes is illegal, even consequent to it another impugned order dated 21-3-2005 is also illegal.

15) In the result, the petition is allowed. Both the impugned orders dated 18-3-2005 and 21-3-2005 passed by the Prescribed Authority are quashed and accordingly the election petition instituted by respondent No.1 is rejected. No costs.

Sd/-
V.K.Shrivastava
Judge

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